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Supreme Court, U.S.
FILED

No. 03 777 NOV 21 2003

In The

Supreme Court of the United States

WILLIE R. FLINT,
on behalf of himself
and all others similarly situated,

Petitioner,

v.

ABB, INC., f/k/a
ABB POWER T&D CO., INC., et al.

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), authorize an ERISA plan beneficiary to recover interest on benefits paid retroactively after a successful administrative appeal when the employee-benefit plan does not explicitly provide for interest on reinstated benefits.

Does ERISA § 502(a)(1)(B) or § 502(a)(3)(B) authorize a beneficiary to recover interest on benefits paid after the date the benefits were due under the Plan absent an explicit Plan provision requiring the Plan to pay such interest.

May a district court dismiss a complaint with prejudice without considering materials submitted by the plaintiff to show that even without the benefit of discovery it is not "beyond doubt" that he can prove facts to support a claim which would entitle him to relief?

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PETITION FOR A WRIT OF CERTIORARI

Willie R. Flint respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-12) is reported at 337 F.3d 1326 (11th Cir. 2003). The last district court opinion (App. 13-28) is reported at 229 F.Supp.2d 1338 (S.D. FL 2002), while the first order (App. 29-38) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 21, 2002 (App. 1-12). Timely filed petition for rehearing was denied August 27, 2003 (App. 39-40) the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 502(a)(1)(B); 29 U.S.C. § 1132. Civil enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought–
(1) by a participant or beneficiary– . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

STATEMENT[1]

Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Flint, individually and as a class representative, sued ABB alleging its refusal to pay interest on retroactively reinstated benefits was "contrary to the terms of Flint's and each Class member's Plan, unreasonable, arbitrary and

[1] All emphasis is supplied unless indicated otherwise.

capricious, and a breach of the obligation to pay full and complete benefits." Original jurisdiction was predicated on 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

I. ABB Abruptly Terminated Flint's LTD Benefits After Nearly Three Years.

In March 1998, Flint, a 20 plus year employee of ABB, was rendered totally disabled in an automobile accident. In due course, he applied for and received long term disability (LTD) benefits under ABB's ERISA Plan.

Nearly three years later, by letter of June 19, 2001, ABB's claim processor, Kemper National Services (KNS), without warning notified Flint that he "no longer [met] the ABB, Inc., definition of Total Disability," based on a review of medical information and a "labor market survey" that identified two jobs Flint supposedly could do based on his "residual physical abilities" and "transferable skills."

II Flint Appealed the Termination and ABB Retroactively Reinstated His Benefits.

By letter of July 2, 2001, Flint initiated his first administrative appeal with an extensive 1999 vocational evaluation by Dr. Jack Sink, a Certified Vocational Evaluator, who found Flint "essentially illiterate," tested intelligence in the "fifth percentile," with no transferrable skills, and totally and

permanently disabled from any gainful employment.[2] On August 31, 2001, ABB denied Flint's appeal, finding the 1999 report irrelevant to Flint's employability in 2001.

Before his second administrative appeal, Flint requested ABB furnish all Plan documents pertaining to Flint's LTD benefits. The documents KNS mailed on October 17, 2001 were out of date (they named the wrong plan sponsor and identified an insurance company as the administrator and insurer of the plan when ABB is the sponsor and administrator, and since at least 1995 the plan has been self-funded by employee contributions), incomplete, erroneous, and self-contradictory, and stated, "If there is any conflict between the provisions of this book and a Plan document, the terms of the Plan document will control."

There appeared to be two LTD Plans and a General Information section. (This section stated it applied to *salaried* employees represented by the Athens Westinghouse Employees Association, while Flint was an hourly, IBEW 2109 employee.)[3] ABB argued below that the documents contained both the Plan

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[2] The facts are stated most liberally for Flint since the district court stayed all discovery and dismissed his amended complaint with prejudice. Some facts, such as the content of the July 2, 2001, letter, do not appear in the court of appeals' opinion or the district court opinions. Nevertheless, every fact stated herein can be proved unequivocally, even without the benefit of discovery.

[3] In Reply to Flint's Opposition to ABB's Motion to Dismiss, ABB attached a different "General Information" section never previously provided to Flint, and claimed it applied.

and the Summary Plan Description (SPD); however, nowhere did "SPD" or "Summary Plan Description" appear in any of the documents.[4] The language ultimately relied on by the district court and court of appeals about when benefits could be terminated was in the portion ABB claimed was the SPD, and it conflicted with the language of the "Plan document."

Each "Plan" and ABB's June 19, 2001, termination letter defines disability differently:

> ***First Plan (Probably the SPD)***: ". . . you cannot do any gainful work that you are suited for by education, training or experience in or outside ABB."
>
> ***Second Plan (Probably the Plan Document)***: "inability . . . to engage in any gainful occupation for which you are reasonably fitted by education, training or experience."
>
> ***June 19, 2001, Notice of Termination***: unable to "perform any occupation for which you are ***or could become*** qualified based on your education, training and experience."

The "Plans" also disagree on when benefits may be terminated:

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[4] 29 U.S.C. § 1022

First Plan: **"When Benefits Stop**

In all cases, LTD benefits stop if you:
Are no longer totally disabled or do not give proof of your continued disability."

Second Plan: **". . . benefits cease when you recover or become actively employed or upon your death.**

* * *

In no case will benefits be paid by this Plan:

1. **For any period on or after the date you fail to furnish satisfactory proof, as required by the insurance company, of the continuance of total disability."**

KNS's Termination Letter does not state that Flint had "recovered" or that he was "actively employed." And, ABB never gave Flint an opportunity to furnish proof of his continued total disability before it terminated his benefits.

Flint's second administrative appeal of October 29, 2001 included an updated evaluation by Dr. Sink stating that as in 1999, Flint remained totally and permanently disabled from any gainful employment.[5] Flint's doctor would not see him until after the second appeal period, so Flint requested ABB allow additional time to submit the doctor's report, which ABB did, and Flint mailed the report on December 17, 2001.

By letter of December 20, 2001, ABB notified Flint of its

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[5] The district court and court of appeals' opinions incorrectly state that Flint submitted additional *medical* information with his October appeal.

decision to reinstate his benefits retroactively. Thus, it is extremely unlikely the doctor's report stating Flint "cannot do much work" was received or considered by ABB.

III. ABB Refused To Pay Interest Because Its Plan Does Not Explicitly Require Interest On Retroactive Benefits.

Flint demanded interest on the retroactive benefits, but ABB refused because ABB's Plan did not explicitly require it, and therefore, ABB ***never*** pays interest on reinstated benefits. The Plan documents provided to Flint are silent on whether interest is due on benefits paid after they are due.

IV. Proceedings Below

A. District Court

1. Flint's Complaint For Interest On "Delayed Benefits" Pursuant To § 502(a)(1)(B) Is Dismissed.

Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Flint, individually and as a class representative of all ABB Plan beneficiaries, sued ABB alleging its refusal to pay interest was "contrary to the terms of Flint's and each Class member's Plan, unreasonable, arbitrary and capricious, and a breach of the obligation to pay full and complete benefits." Flint did not attach Plan documents to his original complaint

because of the many errors in those ABB produced, intending instead to establish the exact Plan terms through discovery.

ABB moved to dismiss the complaint and attached to its motion unverified copies of the Plan documents previously supplied to Flint. Despite Flint's request, these copies were never sworn to by ABB or affirmatively represented by ABB's counsel to be all the applicable Plan documents.[6] The district court stayed discovery and thus prevented Flint's verification of the Plan terms under oath.

The District Court dismissed Flint's Complaint holding that a claim for interest on "delayed benefits" is not allowed under § 502(a)(1)(B), when the Plan document itself does not expressly require it, but that § 502(a)(3)(B) may authorize interest as "other appropriate equitable relief" if Flint could plead "unreasonable delay in payment of benefits" or that they were "wrongfully withheld or 'delayed' in violation of any provision of the Plan or ERISA." (App. 32-34)

2. Flint's Amended Complaint Is Dismissed With Prejudice.

Flint amended his complaint and attached the Plan

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[6] This became particularly troublesome when ABB initiated another annual review of Flint's continued eligibility for LTD benefits while the case was pending in the court of appeals. Flint again requested the Plan documents, and KNS provided a completely different set of Plan documents. The court of appeals granted Flint's Motion to Supplement the Record with this later set of documents.

documents previously provided by ABB. He alleged they were incomplete and contradictory and that ABB had refused to allow any representative of Flint to review all Plan documents at ABB's offices.[7] Thus, he could not be sure any of them were accurate and discovery was necessary to determine the exact plan documents.

The Amended Complaint also alleged various breaches of ERISA and the Plan which caused an unreasonable delay in the payment of his benefits:

- ABB failed to require or allow Flint to furnish evidence of continued total disability before terminating his benefits.
- The reasons and information recited in the termination letter were a sham.
- ABB's policy to ***never*** pay interest on delayed benefits is a violation of the Plans' express or implied terms.

In responding to ABB's motion to dismiss, Flint filed various documents not attached to the amended complaint to demonstrate that he could prove a set of facts consistent with the complaint that would entitle him to relief. The district court refused to consider them, and the court of appeals by its silence seems to have done likewise. These documents demonstrated the notice of termination was a sham:

- The termination letter misstated and omitted medical

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[7] 29 U.S.C. § 1024(b)(4).

information in ABB's possession demonstrating Flint was totally disabled.

The "labor market survey" included false information. Of the two jobs "identified" for Flint, he was incapable of performing either. Dr. Sink's report submitted with Flint's second administrative appeal pointed out several blatant falsehoods when it concludes:

> [The] August 31, 2001 letter[8] . . . suggests that to be eligible for disability insurance, Mr. Flint would have to be determined to be unable to "perform any occupation for which you are ***or could become*** qualified based on your education, training and experience." It is obvious that the labor market survey which was done by Ms. Chapman did not consider Mr. Flint's education (either grade completion or tested) and, since he has had no training or experience which is beneficial to him to future employment, it appears obvious that they were not considered either. In addition, Mr. Flint's inability to complete even a job application nor his inability to read sufficiently to understand job specifications, descriptions, etc., were considered. Therefore, there is no valid information found in these documents which invalidate the opinion in my

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[8] This letter denies Flint's initial appeal of his termination, which provided to KNS Dr. Sink's March 26, 1999 occupational evaluation that concluded Flint was totally and permanently disabled from any gainful occupation.

report of March 26, 1999.

The district court stayed discovery and dismissed the amended complaint with prejudice reiterating its previous ruling on § 502(a)(1)(B), and further finding that (1) the Plan document did not require advanced notice before terminating Flint's benefits; (2) the notice of termination was adequate and "additional factual issues that are not pled and/or referenced in the First Amended Complaint" were not considered as "improperly before the court," (3) the plan documents provided to Flint are not unclear or contradictory, and even if they are, that would not support equitable relief under § 502(a)(3)(B), (4) the timely appeal process resulting in retroactive reinstatement of Flint's LTD benefits would not support an award of interest, and (5) The request for declaratory judgment and injunction regarding future benefits was not reached because Flint failed to state a claim for interest on delayed benefits.

B. The Court Of Appeals Affirmed.

The court of appeals rejected Flint's § 502(a)(1)(B) claim because it supposedly would require creating a "new cause of action" not explicitly authorized by ERISA, which this Court has repeatedly shunned. (App. 5-7) It rejected Flint's § 502(a)(3)(B) claim because (1) as a simple claim for money, it is not equitable relief and thus prohibited by *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), and (2) as a request for "other appropriate equitable relief" for ABB violating its fiduciary

duty when it terminated Flint's benefits, the complaint failed to state a claim.

REASONS FOR GRANTING THE PETITION

The first two questions presented regarding interest on overdue ERISA benefits affect every worker in this country who does or will receive benefits from an ERISA Plan.

ERISA Plans are contractual. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). This court recognized over 150 years ago that interest on unpaid obligations to pay money is an implied term of all contracts. *Curtis v. Innerarity*, 6 How. 146, 154, 12 L.Ed. 380 (1848). The authority this court cited for that proposition, 2 *Fonblanque, Eq.* 423, is itself over 300 years old. *See also Restatement (Second) of Contracts* § 354 and comment c (1979)(unless otherwise agreed, interest is *always* recoverable for the nonpayment of money once payment has become due and there is a breach). Interest is not a new cause of action. It is the full amount contracted for.

Congress enacted ERISA to "promote the interests of employees and their beneficiaries in employee benefit plans," *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-362, 100 S.Ct. 1723, 1726-1727, 64 L.Ed.2d 354 (1980). If Congress intended to include the fine historical distinctions between law and equity when it allowed "other appropriate equitable relief" in § 502(a)(3)(B), *Knudson*; surely it did not intend to overrule, *sub silento*, over 150 years

of contract law making interest an implied term of all contracts.

The first circuit court to consider interest on unpaid benefits noted ERISA's silence. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert denied 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 834 (1981). Relying on decisions of this court involving other federal statutes that are silent on interest, *Miller v. Robertson*, 266 U.S. 243, 256-258, 45 S.Ct. 73, (78-79) 69 L.Ed. 265 (1924); *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947); the eighth circuit found prejudgment interest appropriate despite ERISA's silence. *Dependahl* at 1218-1219. Other circuits agree: *Smith v. Am. Int'l. Life Assur. Co. of N.Y.*, 50 F.3d 956 (11th Cir. 1995); *Lutheran Medical Center of Omaha, NE v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan*, 25 F.3d 616 (8th Cir. 1994) (prejudgment interest compensates for delayed payment of benefits and makes beneficiary whole for denied use of money); *Tieneyer v. Community Mutual Insurance Co.*, 8 F.3d 1094 (6th Cir. 1993) (abuse of discretion not to award prejudgment interest); *Quesinberry v. Life Insurance Company of North America*, 987 F.2d 1017 (4th Cir. 1993) (error to deny prejudgment interest); *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees*, 960 F.2d 1187, 1192 n. 4 (3rd Cir. 1992); *Rivera v. Benefit Trust Life Insurance Company*, 921 F.2d 692 (7th Cir. 1991) (prejudgment interest prevents unjust enrichment when interest was earned on funds which should have been paid for benefits). Thus, when a *court* enters judgment for overdue benefits, interest is necessary for complete relief.

The issue here is whether a different rule applies when

benefits are paid retroactively to the due date as a result of a successful administrative appeal.

Several circuit courts have considered the issue. Most have declined to even rule on § 502(a)(1)(B), instead relying on § 502(a)(3)(B). Still the answers are conflicting. *Fotta v. Trustees of the United Mine Workers of America,* 165 F.3d 209, 213 (3d Cir. 1998), appeal after remand, 319 F.3d 612 (3d Cir. 2003) cert. denied, --- S.Ct. ---, 2003 WL 22004958, 72 USLW 3148, 72 USLW 3302, 72 USLW 3307 (U.S. Nov 03, 2003) (NO. 03-260); *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748,749-50 (8th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999); *Clair v. Harris Trust & Sav. Bank.*, 190 F.3d 495, 498 (7th Cir. 1999). And, as the court of appeals below noted, *Knudson* has cast doubt on those cases relying on § 502(a)(3)(B).

The circuit court below adhered to this court's admonition against implying causes of action or remedies not specifically stated in ERISA and denied relief because it viewed interest on retroactively reinstated benefits as creating a new cause of action, not a matter of granting the full benefit due the beneficiary, for which § 502(a)(1)(B) provides an explicit remedy. (App. 7) The recovery of interest is no more a "new cause of action" than is a claim that ABB miscalculated, and therefore underpaid, benefits due under its Plan.

This court may take judicial notice of the fact that many ERISA plans are funded by insurance policies and the insurance companies are usually the Plan administrator with the discretion to interpret their own insurance policies as to when benefits are

due. Indeed, the Plan documents provided by ABB, though out of date, state the Plan is insured and administered by an insurance company who has the final discretion in deciding claims. To deny interest when an insurer or other Plan administrator terminates ongoing benefits and then reinstates them retroactively is nothing short of an invitation to terminate benefits and see which beneficiaries have the wherewithal and fortitude to fight. And, to those who do, pay benefits as a result of an administrative appeal while retaining the interest on the withheld benefits. It is a license to steal! And by a fiduciary!

ABB will respond that "wrongfully" withheld benefits may entitle the beneficiary to interest, but ABB did not act "wrongfully" because the appeal process was timely. Still, the retroactive payment means the benefits were due before they were paid, and the court of appeals held that Flint's allegation that the termination was a sham was insufficient to allege a claim upon which relief could be granted.[9] This is all the more poignant since Flint attached documents to his response to ABB's motion to dismiss to support his allegations as a matter of fact, not speculation, but the district court (App. 23) and court of appeals refused to even consider them, or allow Flint to amend to allege specifically the facts demonstrated by those documents. *Swierkiewicz v. Sorema N. A.* –U.S.–, 122 S.Ct. 992, 152 L.Ed.2d 1, 70 USLW 4152 (2002).

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[9] Each of the other reasons given by the court of appeals is factually wrong as a matter of the record below; however, Flint has omitted these errors because of this Court's admonition in Rule 10. Should the Court grant this petition, those errors would be demonstrated in a brief on the merits.

CONCLUSION

The Petition for Writ of Certiorari should be granted on each of the questions presented.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15029

D.C. Docket No. 02-20424-CV-DLG

WILLIE R. FLINT, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

versus

ABB, INC., f.k.a. ABB Power,
T&D CO., INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 21, 2003)

Before BARKETT and KRAVITCH, Circuit Judges, and

FULLAM*, District Judge.

KRAVITCH, Circuit Judge:

This case presents two questions. The first is whether § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), authorizes an ERISA plan beneficiary to receive interest on reinstated benefits when the employee-benefit plan (the "Plan") does not explicitly provide for interest on reinstated benefits. The second question is whether plaintiff-appellant Willie R. Flint has stated a claim under § 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B), that would allow him to recover interest on reinstated benefits.

I. BACKGROUND

Flint is a former employee of defendant-appellee ABB, Inc. After an automobile accident in March 1998, Flint applied for and received disability benefits under ABB's Plan. He had been receiving disability benefits for approximately three years when ABB, through its claims processor, Kemper National Services ("Kemper"), received information from Flint's attending physician indicating that Flint was no longer totally disabled. Under the terms of the Plan, ABB could stop paying disability benefits if Flint either (1) was "no longer totally disabled" *or* (2) failed to "give proof of [his] continued disability."

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* Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Given the Plan's provisions, ABB investigated whether to continue paying Flint's disability benefits. It requested an independent labor-market survey, which concluded that "several appropriate positions were found" in which Flint could work. Consequently, ABB informed Flint on June 19, 2001 that he was no longer "totally disabled" within the meaning of the Plan and that his disability benefits would terminate on July 1, 2001. June 19, 2001 was the first time that Kemper informed Flint that his case was under review.

Flint wrote a letter dated July 2, 2001 to appeal the disability termination. On August 31, 2001, ABB through Kemper, denied Flint's appeal. In October 2001, Flint again appealed the termination of benefits and this time provided Kemper with additional medical information. Flint also asked Kemper to give him a filing extension so that he could have more time to furnish additional medical information to support his claim for reinstatement. He asked for this extension because his doctor was unable to see him within the appeals period. In November 2001, Kemper acknowledged receiving the second appeal and granted Flint an extension in which to provide additional medical information supporting his claim. Flint provided the additional medical information, and shortly thereafter, Kemper reinstated Flint's benefits and made the reinstatement retroactive to July 1, 2001. Kemper issued a check for these benefits on December 28, 2001. Flint has conceded that the appeals process, which ultimately led to the reinstatement of his benefits, did not violate the Plan, the ERISA statute, or any Department of Labor regulations.

Flint brought suit against ABB in February 2002, maintaining that he is entitled to interest payments on the retroactive Plan benefits. Flint characterized these retroactive benefits as "delayed benefits." Flint conceded that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits"; nevertheless, he claimed that § 502(a)(1)(B) and § 502(a)(3)(B) of ERISA allow plaintiffs to recover accrued interest on reinstated benefits, even when an employer's plan is silent on the issue.

ABB moved to dismiss Flint's claim pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that Flint had not stated a claim upon which relief could be granted. The district court granted the motion, concluding that Flint had not alleged facts that would entitle him to relief under either § 501(a)(1)(B) or § 502(a)(3) of ERISA. The court held that § 501(a)(1)(B) does not create an implied right to recover accrued interest for reinstated payments, but instead allows recovery only for "benefits specified in the plan." It also held that § 502(a)(3)'s catch-all provision concerning "appropriate equitable relief" might allow plaintiffs to recover accrued interest for reinstated benefits - but only when benefits are unreasonably delayed or wrongfully withheld. The court concluded that Flint had not pleaded facts demonstrating that ABB had unreasonably delayed or wrongfully withheld his benefits. Accordingly, it dismissed Flint's claim without prejudice and allowed Flint to amend his complaint, which he did; the district court concluded, however, that Flint's amended complaint had not alleged facts that, if proven, would entitle him to relief under §

502(a)(3)(B)'s catch-all provision. Flint also requested a declaration that he and other plan members had present and future rights to receive interest on reinstated benefits, but the district court denied this relief as well.

II STANDARD OF REVIEW

We review de novo the dismissal of a complaint for failure to state a claim, accepting all allegations in the complaint as true and construing facts in a light most favorable to the plaintiff. *Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir. 1993). A court cannot use Federal Rule of Civil Procedure 12(b)(6) to dismiss a complaint for failure to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

III. ANALYSIS

We must decide whether Flint has stated a claim under either § 502(a)(1)(B) or § 502 (a)(3)(B) that entitles him to interest on his reinstated benefits.

A. Whether Interest for Reinstated Benefits Is an Implied Term of § 502(a)(1)(B)

Section 502(a)(1)(B) of ERISA provides that a participant or beneficiary of an employee-welfare benefit plan may bring

a civil action

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

29 U.S.C. § 1132(a)(1)(B).

Flint argues that accrued interest payments constitute "benefits due to him under the terms of his plan" within the meaning of § 502(a)(1)(B), reasoning that paying interest on reinstated benefits is an implied term of the Plan. The basis for this argument is that (1) ERISA plans are contracts and (2) the default rule in contract law is that a party is entitled to receive interest on unpaid obligations to pay money.[1] According to this theory, ABB breached the contract by delaying the payment of benefits and consequently, should pay Flint interest to compensate him for the time value of the reinstated benefits.

We are reluctant to infer an implied cause of action from § 502(a)(1)(B). The Supreme Court has "observed repeatedly that

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[1] Flint cites the Supreme Court's opinion in *Curtis v. Innerarity*, 6 How. 146 (1848), which states, "Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said, that such is the implied contract of the parties." *Id.* at 154.

ERISA is a "comprehensive and reticulated statute," the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). The Court has "emphasized [its] unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

Furthermore, no circuit has recognized a claim for interest under § 502(a)(1)(B) of ERISA. The only circuit to address the issue directly has ruled that if interest is not a benefit expressly provided for in the employee-benefit plan, it cannot be recovered under § 502(a)(1)(B), because "only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B)." *Clair v. Harris Trust & Sav. Bank*,, 190 F.3d 495, 497 (7th Cir. 1999) (Posner, J.). Given the Supreme Court's unwillingness to allow implied causes of action under ERISA and the fact that, like the plan in *Clair*, the Plan here does not provide for such interest, we follow *Clair* and conclude that Flint's claim under § 502(a)(1)(B) fails.

B. Whether Flint Has Stated a Claim Under § 502(a)(3)(B) that Would Allow Him to Recover Interest on Reinstated

Benefits

Flint argues that § 502(a)(3)(B) of ERISA supplies another basis for recovering accrued interest for reinstated benefits. Section 502(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan* . . . .

29 U.S.C. § 1132(a)(3) (emphasis added).

Flint maintains that awarding accrued interest on reinstated benefits falls into the category of "appropriate equitable relief." ABB responds, correctly, that interest on money past due under a contract is a classic form of compensatory damages and, as such, does not qualify as "equitable relief" under § 502(a)(3)(B). *See Knudson*, 534 U.S. at 210 (explaining that suits for money damages are "the classic form of *legal* relief" and, therefore, are not recoverable under § 502(a)(3)(B)).

Flint, however, proposes an alternative theory for the causative event that gives rise to ABB's alleged duty to pay for the time value of the "delayed benefits." Flint argues that ABB violated its fiduciary duties to him when it initially terminated his benefits and that ABB should therefore disgorge the benefit

derived from this breach. Under this theory, the case is one of wrongful enrichment - the wrong being the breach of a fiduciary duty and the enrichment being the time value of the money that ABB should have paid to Flint between July 1 and December 28, 2001. Because courts of equity traditionally ordered fiduciaries to disgorge wrongful enrichments, Flint maintains that the relief he seeks is "appropriate equitable relief" under § 502(a)(3)(B).

Several circuit courts of appeals - speaking in terms of a fiduciary's "unjust enrichment" (rather than its "wrongful enrichment"[2]) - have held that interest payments on delayed benefits may, in some circumstances, constitute "other equitable relief" within the meaning of § 502(a)(3)(B). *See, e.g., Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 229-30 (2d Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001); *Clair*, 190 F.3d at 498-99; *Fotta v. Trustees of*

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[2] An unjust enrichment occurs when the defendant holds something that belongs to the plaintiff or receives, without legal cause, a transfer of goods or services from the plaintiff. The law of unjust enrichment is concerned solely with enrichments that are unjust *independently* of wrongs and contracts. When the plaintiff relies on a breach of contract to supply the "unjustness" of the defendant's holdings, the right on which he or she relies arises from the breach of contract, not from an unjust enrichment; analogously, when the plaintiff relies on a wrong to supply the "unjust factor," the causative event is a wrongful enrichment rather than an unjust enrichment. *See* Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 Texas L. Rev. 1767, 1783 (2001).

the United Mine Workers of Am., 165 F.3d 209, 213 (3d Cir. 1998). Most of these cases, however, were decided before *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), in which the Supreme Court's interpretation of "appropriate equitable relief" was more narrow than the interpretations found in previous decisions by the circuit courts of appeals. The Court instructed that, in determining whether relief "is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)) remains dependent on the nature of the relief sought," and the Court resisted plaintiffs' attempt to characterize their claim for enforcement of a reimbursement provision of an ERISA plan as one for equitable restitution. *Id.* The Court's decision in *Knudson*, therefore, raises the question whether § 502(a)(3) ever allows an award of interest for delayed benefits or whether such a claim is an impermissible attempt to dress an essentially legal claim in the language of equity.

We need not, however, decide that issue in this case. Even assuming that § 502(a)(3)(B) could be the basis for recovering interest, Flint's amended complaint does not state a claim upon which relief can be granted. Flint maintains that ABB breached it fiduciary duty by terminating his benefits without first requesting or allowing him a reasonable opportunity to provide evidence of continued disability before making the determination to discontinue benefits. Three circumstances described in the pleadings, however, lead us to reject Flint's argument. First, the Plan provided that ABB could stop paying disability benefits when Flint was "no longer disabled," and,

here, Flint's own doctor had advised ABB that Flint was no longer completely disabled. Furthermore, an independent report recommended several jobs that Flint could perform within the limitations prescribed by Flint's doctor. Second, the Plan specifies that "[i]n no case will benefits be paid by this Plan . . . for any period on or after the date [the employee] fail[s] to furnish satisfactory proof [of disability] as required by the insurance company . . . ." Therefore, the Plan entitled ABB to terminate benefits when Flint failed to provide proof of his continuing disability by July 1, 2001.[3] Furthermore, given that ERISA employers owe a fiduciary duty to all of their covered employees, ABB had a duty to protect and preserve benefit funds according to the provisions of the Plans and the ERISA statute. Finally, Flint has not pleaded facts that would show that ABB unduly delayed the ERISA appeals process or wrongfully refused to reinstate his benefits retroactively at the end of the process. *Cf. Clair*, 190 F.3d at 499 (holding that plaintiff was barred from collecting accrued interest when employer disbursed benefits according to the procedure and the time period outlined in the employee-benefit plan). To the contrary, Flint's own allegations make clear that the appeals

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[3] Flint's best argument to the contrary is that once ABB sent the June 19th notice, it voluntarily assumed the obligation to give Flint a reasonable time period in which to provide additional medical information. Yet, as the district court noted, neither the Plan nor ERISA regulations impose an advanced-warning requirement, and, given the Supreme Court's reluctance to find implied duties under ERISA, we decline to infer such an implied duty here.

process functioned according to Plan provisions and ERISA regulations - and that this process led to the retroactive reinstatement of benefits within six months of the initial adverse decision. Accordingly, Flint has not stated a claim under § 503(a)(3)(B).

IV CONCLUSION

For the reasons stated, we AFFIRM the decision of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 02-20424-CIV-GRAHAM

WILLIE R. FLINT, on behalf
of himself and all persons
similarly situated,

Plaintiff,

vs.

ABB, INC. f/k/a ABB POWER
T&D COMPANY, INC.,

Defendant.
_____/

OPINION AND ORDER

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss the First Amended Class Action Complaint (D.E. 23).

THE COURT has considered the motion, the pertinent portions of the record, and is otherwise duly advised in the premises.

I. BACKGROUND

This is a purported class action suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, for accrued interest on "delayed benefits" wherein the benefits at issue have been reinstated and the subject employee benefit plan did not expressly provide for interest on "delayed benefits."

Plaintiff Willie R. Flint ("Plaintiff" or "Flint"), is a participant and beneficiary of certain employee welfare benefit and pension benefit plans sponsored and/or administered by the Defendant ABB, Inc. or its predecessor ABB Power ("ABB"). In his Amended Complaint, Plaintiff alleges that his benefits under ABB's long-term disability plan ("LTD Plan" or "Plan") were terminated in violation of the LTD Plan, and that although ABB later reinstated said benefits retroactive to the day of termination, he has been denied his "full and complete" benefits because ABB did not pay him accrued interest on the reinstated sum.

The relevant allegations are as follows. In or about March, 1998, Plaintiff became totally disabled as a result of an automobile accident. In due course Flint applied for, and ABB granted, benefits under the LTD Plan. The Plan states that in no case would benefits be paid "for any period on or after the date you fail to furnish satisfactory proof . . . of the continuance of total disability." D.E. 18, Amended Complaint, Ex. C, at 4.

Approximately three years after Plaintiff became disabled, the Plan's claims administrator, Kemper National Services ("Kemper"), obtained information from Plaintiff's attending physician indicating that Plaintiff had the "physical capacity to perform work activities" and was no longer totally disabled. D.E. 18, Ex. A, at 1.

Consequently, on June 19, 2001, Kemper notified Plaintiff in writing that he no longer met the LTD Plan's definition of total disability, and that Kemper would discontinue his benefits after June 30, 2001. *See Id.* Prior to the June 19, 2001, notice, Kemper did not inform Plaintiff that his case was under review.

In his Amended Complaint, Plaintiff now alleges, in conclusory fashion, that a few months following the initial denial of benefits, Plaintiff provided additional medical information, after which the disability benefits were ultimately reinstated on or about December 1, 2001, retroactive to July 1, 2001. However, despite Plaintiff's demands, the reinstated sum did not include any amount for interest. *Id.*[1]

Plaintiff concedes, and the Amended Complaint does not otherwise allege, that the processing of his appeal (which

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[1] Plaintiff conceded in his initial Complaint that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits." D.E. 1, Complaint, ¶22. Although this allegation is omitted from the Amended Complaint, nowhere does the Amended Complaint allege that the Plan expressly provided for the payment of interest on "delayed benefits."

successfully resulted in the reinstatement of his benefits) was handled in a timely manner and within the time frame established by Department of Labor regulations. *See, e.g.*, Plaintiff's Opp. Mem. at 12.

Thus, Plaintiff appears to allege that he should be awarded interest on his "delayed benefits," not because of any delay in the appeal process, but because Plaintiff claims his benefits should have not been discontinued in the first instance. Plaintiff alleges that had he been given advance warning and an opportunity to submit additional information *before* his benefits were discontinued, his benefits would not have been "delayed." Plaintiff alleges that this failure to provide advance warning or an opportunity to submit further information before his benefits were terminated violated the terms of the LTD Plan.

Plaintiff also alleges that the termination notice provided to him was deficient in that it did not adequately explain the reasons for the termination of his benefits. Further, Plaintiff alleges that, in violation of ERISA and/or the terms of the LTD Plan, Plaintiff was provided with the incorrect Plan documents. *See* Amended Complaint, ¶¶18-29.

Based on the alleged violations as set forth above, Plaintiff alleges that he should be entitled to accrued interest on the "delayed benefits" already provided to him.

II. STANDARD OF REVIEW

It is axiomatic that "a complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In ruling on a motion to dismiss, a federal court must view the complaint in the light most favorable to plaintiff and accept its allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Beck v. Deloitte & Touche*, 144 F.3d 732 (11th Cir. 1998). Thus, in the context of a motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. DISCUSSION

A. Count I

Count I arises under §502(a)(3)(B) of ERISA, 29 U.S.C. §1132(a)(3)(B), which provided in pertinent part that a civil action may be brought:

> by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to *obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.*

29 U.S.C. §1132(a)(3) (emphasis supplied). Under this count, Plaintiff contends that interest is due him as a matter of equity, in order to prevent the Plan's unjust enrichment.

In order for Plaintiff to state a claim for interest on "delayed benefits," Plaintiff must adequately allege facts supporting a claim that Kemper violated either a specific ERISA requirement or the terms of the LTD Plan itself, and the alleged violation must be of the kind which gives rise to a claim for equitable relief. 29 U.S.C. §1132(a)(3)(b).

In this Court's Order dated April 10, 2002, granting Defendants' motion to dismiss with leave to amend, the Court noted the following pleading deficiencies with respect to Plaintiff's claim for interest on delayed benefits:

> [T]he Complaint makes no allegations and fails to state any facts indicating that Plaintiff's benefits were wrongfully withheld and "delayed" in violation of any provision of the Plan or ERISA. The Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures. Nor does the Complaint allege any facts which may indicate that the processing of his claim for disability benefits was otherwise unreasonable, or in violation of ERISA or the terms of the Plan. Without more, the Court must conclude that as pled, the Complaint fails to allege facts which make out a Section

502(a)(3)(B) claim for accrued interest with respect to "delayed benefits."

See April 10, 2002 Order, D.E. 16, at 8-9.

In an attempt to correct the prior pleading deficiencies identified by this Court, Plaintiff alleges in his Amended Complaint that Defendants violated either ERISA or the Plan by (1) failing to provide advance warning and an opportunity to submit additional medical information in support of his continuing disability, prior to terminating his benefits; (2) providing inadequate notice of the specific reasons for the termination of his benefits; and (3) providing Plaintiff with the incorrect Plan documents. *See* Amended Complaint, ¶¶18-29.

In response to this Court's prior Order, Plaintiff argues that the timeliness of the process through which his benefits were reinstated is irrelevant to the issue of his entitlement to the equitable relief of interest on "delayed benefits." Plaintiff's Opposition Brief, D.E. 32, at 12. The Court will consider each of these allegations, and the purported violations of ERISA or the Plan, in turn.

1. **Whether the "Advance Warning" Allegations Support Plaintiff's Claim for Equitable Relief**

Plaintiff primarily contends that he is entitled to interest on his "delayed benefits" because Kemper allegedly violated the procedure outlined in the LTD Plan, by not allowing or

requesting Plaintiff to substantiate his disability *before* Kemper discontinued his benefits in June, 2001. Specifically, Plaintiff singles out the following provision from the LTD Plan:

> In no case will benefits be paid by this Plan –
>
> (1) For any period on or after the date you fail to furnish satisfactory proof as required by the insurance company, of the continuance of total disability.

Amended Complaint, Ex. C. Thus, as the plain terms of this provision makes clear, the failure to furnish satisfactory proof of disability may constitute grounds for the denial of benefits.

Plaintiff, however, offers a far broader interpretation of this provision, and submits that it imposes an obligation on Kemper to request and allow plan participants to furnish additional information *before* benefits can be discontinued. Thus, in the instant case, Plaintiff contends that prior to discontinuing his benefits, this provision required Kemper to allow Plaintiff to furnish *further* information to refute or contradict the information Kemper had already obtained (as referenced in Exhibit A to the Amended Complaint).

The court finds that the provision's plain language does not support Plaintiff's strained interpretation. The Plan provision at issue here merely states that *if* Kemper were to ask Plaintiff to furnish satisfactory proof of the continuance of his total disability, and Plaintiff failed to provide it, the failure to

provide benefits shall constitute grounds for the termination of benefits.

Accordingly, because Plaintiff has not properly alleged that the failure to provide "advance warning" or an opportunity to submit additional information prior to the termination of benefits violated any provision o ERISA or the LTD Plan, such allegations cannot state a claim for accrued interest as equitable relief under Section 502(a)(3)(B).

2. Whether the "Inadequate Notice" Allegations Support Plaintiff's Claim for Equitable Relief

Plaintiff next contends that he is entitled to accrued interest on his "delayed benefits" because Kemper's June 19, 2001, 3-page letter to Plaintiff inadequately explained the reasons for the termination of his benefits, in violation of ERISA regulations.

The pertinent ERISA regulation obliges Kemper to provide Plaintiff with a written notification of any adverse benefit determination, and the notification must set forth, in a manner calculated to be understood by the claimant:

> (i) The specific reason or reasons for the adverse determination; (ii) Reference to the specific plan provisions on which the determination is based; (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why

> such material or information is necessary; (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review.

29 C.F.R. §2560.503-1(g).

The Court finds that Plaintiff's conclusory assertion that the June 19, 2001 notification letter was inadequate is contradicted by the letter itself, which is attached as Exhibit A to the First Amended Complaint. By its terms, the notification letter provided the specific reasons for the adverse determination, made reference to the specific Plan provision on which the denial was based, explained how Plaintiff might perfect his claim, and described the Plan's review procedures and the time limits applicable to such procedures. *See* Amended Complaint, Ex. A, at 1-3.

Further, Plaintiff's reliance on *Halpin v. W.W. Granger, Inc.*, 962 F.2d 685 (7th Cir. 1992), is inapposite. In *Halpin*, the Seventh Circuit held that the denial letter at issue in that case did not comply with the notice regulations because the letter did not state the specific reasons for the denial. *Id.*, 962 F.2d at 693. In the instant case, Plaintiff's denial letter, attached as Exhibit A to the First Amended Complaint, unambiguously states the reasons for the discontinuance of benefits.

In support of his argument that the denial letter did not comply with ERISA regulations, Plaintiff appears to resort to additional factual issues that are not pled and/or referenced in the First Amended Complaint. These issues are improperly before the Court, and will not be considered herein.

Accordingly, because the terms of Exhibit A plainly contradict Plaintiff's conclusory allegations, and reveal that Plaintiff was provided with the specific reason for the termination of benefits and the Plan provision relied upon, the Court finds that Plaintiff has failed to state a claim for interest on "delayed benefits" on the ground that the notification letter was in violation of ERISA regulations or the terms of the Plan. *See generally Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97 (5th Cir. 1974) (ruling that on motion to dismiss, conclusory allegations are not admitted as true when such conclusions are contradicted by facts disclosed by document appended to complaint, and holding that dismissal is appropriate if appended document reveals facts which foreclose recovery as matter of law).

3. Whether Plaintiff's Allegations Concerning the Plan Documents Support A Claim for Equitable Relief

Finally, Plaintiff maintains that he is entitled to interest on delayed benefits because Kemper violated the Plan and/or ERISA by providing his attorney with the documents attached as Exhibit B, which Plaintiff claims are "on their face erroneous, self-contradictory, and state that they are not the

actual plan documents," that they "contain not one, but two LTD plans," and that Plaintiff "cannot be sure if any of the documents provided by [Kemper] are the actual plan documents." Amended Complaint, ¶ 22.

The Court finds, however, that there simply is no question about the applicable Plan document, which Plaintiff himself has attached as Exhibit C to the First Amended Complaint, and has relied on in advancing his claims. Further, it is difficult to see how any failure to provide Pan documents *after* benefits were denied can support Plaintiff's claim for interest on delayed benefits, where the argument concerning delay is that the *initial* denial itself should have never been made. Accordingly, such allegations fail to state a claim for interest as equitable relief under Section 502(a)(3)(B).

4. Whether The Timeliness of the Appeal Process Is a Relevant Issue With Regard to Stating a Claim for Delayed Benefits

Plaintiff argues that under the Second Circuit's decision in *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2nd Cir. 2002), the timeliness of the appeals process is irrelevant to the issue of stating a claim for interest on delayed benefits, and that it is sufficient to merely plead that benefits were "unjustly delayed."

In *Dunnigan*, the Second Circuit held that a five-year delay in the payment of benefits, if unjustified, constituted a breach

of fiduciary duty which entitled a beneficiary to receive interest on his benefits. *See Id.*, F.3d at 229-230. The complaint in *Dunnigan* specifically pled that the denial of the participant's benefits application and appeal occurred after the expiration "of the time periods specified by the Secretary of Labor's regulations." *Id.* at 226. *See also Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 499 (7th Cir. 1999) (dismissing as "bordering on the frivolous" a claim of untimeliness where benefit appeals were processed within the time frame established by regulation).

Unlike the situation in *Dunnigan*, which involved a Plaintiff who was forced to wait 60 months for her benefits, there is no allegation here that Plaintiff's appeal was not processed in a timely manner or in violation of ERISA regulations. Rather, Plaintiff's own allegations make clear that the appeal process functioned precisely as intended, and successfully resulted in the retroactive reinstatement of Plaintiff's benefits, within six months of the initial adverse decision.

The Court finds the timeliness of the appeal is relevant to whether Plaintiff has stated a claim for accrued interest on "delayed benefits." Again, as with the initial Complaint, the Court finds that the Amended Complaint fails to state any facts supporting a claim that benefits were "delayed" in violation of any provision of the Plan or ERISA. The Amended Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures.

As such, the Court must conclude that the Amended Complaint fails to allege a Section 502(a)(3)(B) claim, as Plaintiff has not adequately alleged that Kemper violated either a specific ERISA requirement or the terms of the LTD Plan itself, such that the alleged violation would give rise to an equitable claim for interest on "delayed benefits."[2]

5. Equitable remedies

In the Amended Complaint, Plaintiff seeks, *inter alia*, a declaratory judgment that all payments by the Defendants to members of the class for delayed benefits must include interest, an injunction requiring the Defendant to pay class members interest on delayed benefits, the imposition of a constructive trust in favor of the class members upon all Plan assets equal to the interest on delayed benefits, and equitable restitution to the class members in the amount of interest on the delayed benefits. *See* Amended Complaint, at ¶42.

The Supreme Court has held that the term "equitable relief" in Section 502(a)(3) must refer to "those categories of relief that were typically available in equity," and not whatever relief a court of equity might be empowered to provide in a particular case. *Mertens v. Hewitt Associates*, 508 U.S. 248, 256, 113

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[2] In addition to naming the ABB LTD Plan as a defendant, Plaintiff has named numerous other plans in his Amended Complaint. Plaintiff failed to allege any claim for benefits under any of these other plans. Accordingly, Court I must be dismissed in its entirety as to all Defendants.

S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 712-713, L.Ed.2d 635 (2002). Defendants argue that the relief sought in Count I – accrued interest for delayed benefits – is not the type of "equitable relief" typically available in equity under the circumstances presented in this case.

However, having determined, as set forth above, that the Amended Complaint fails to allege facts that Defendants violated any term of the Plan or ERISA in support of his claim for interest on delayed benefits, the Court need not reach this issue.

B. Count II

Plaintiff concedes that the Court previously ruled that he had failed to state a cause of action under § 502(a)(1)(B), and merely repleads Count II in the Amended Complaint to preserve the issue for appellate review. Accordingly, for the reasons set forth in the Court's April 10, 2002, Order, Count II must also be dismissed.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion to Dismiss the First Amended Complaint is hereby **GRANTED**. The First Amended Complaint is hereby **DISMISSED, with prejudice.**

It is further

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes, and any pending motions are denied as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of August, 2002.

/S/
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Gary Gerrard, Esq.
Mark J. Heise, Esq.
Lori A. Brown, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 02-20424-CIV-GRAHAM

WILLIE R. FLINT, on behalf
of himself and all persons
similarly situated,

Plaintiff,

vs.

ABB, INC. f/k/a ABB POWER
T&D COMPANY, INC.,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss the Complaint (D.E. 5).

THE COURT has considered the motion, the pertinent portions of the record, and is otherwise duly advised in the premises.

I. BACKGROUND

Plaintiff, a former employee of Defendant ABB, Inc. ("ABB") or its predecessor, ABB Power, asserts that he is owed accrued interest for alleged "delayed benefits" already paid to him under Defendant's Long Term Disability Plan ("LTD Plan" or "Plan"). Plaintiff contends that Defendant's failure to pay interest on "delayed benefits" violates the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*

The Complaint alleges that Plaintiff applied for and received disability benefits under ABB's Plan after he was involved in an automobile accident on or about March, 1998. Several years later, on June 19, 2001, Defendant ABB, through its claims processor, Kemper National Services ("Kemper"), informed Plaintiff that he was no longer "totally disabled" within the meaning of the LTD Plan and that his disability benefits were being terminated effective July 1, 2001.

Plaintiff appealed the disability determination by letter dated July 2, 2001. On August 31, 2001, Defendant, through its claims processor, denied Plaintiff's appeal.

On October 29, 2001, Plaintiff again appealed the termination of disability benefits, and at that time provided certain additional medical information to Kemper. At the same time, Plaintiff requested that Kemper grant Plaintiff an extension of time to furnish further additional medical

information to support his claim for reinstatement of benefits. Plaintiff asked for this extension because Plaintiff's doctor refused to see him within the appeal period.

On November 12, 2001, Kemper acknowledged receipt of the second appeal, and confirmed an extension for Plaintiff to provide additional medical information to support his claim. At some unspecified time thereafter, Plaintiff provided additional medical information to support his claim.

On December 20, 2001, shortly after Plaintiff provided additional medical information, Kemper notified Plaintiff that his benefits were being reinstated, retroactive to July 1, 2001, and issued a check for such benefits on December 28, 2001.

Plaintiff maintains that he is entitled to interest payments on the retroactive benefits he received under the LTD Plan, benefits which Plaintiff characterizes as "delayed benefits." Plaintiff concedes in the Complaint, however, that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits." Complaint, ¶ 22.

II. STANDARD OF REVIEW

It is axiomatic that "a complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In ruling on a motion to dismiss, a federal court must

view the complaint in the light most favorable to plaintiff and accept its allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Beck v. Deloitte & Touche*, 144 F.3d 732 (11th Cir. 1998). Thus, in the context of a motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. DISCUSSION

Plaintiff asserts that his claim for accrued interest is cognizable under either Section 502(a)(1)(B) or Section 502(a)(3)(B) of ERISA. Defendants argue that Plaintiff's claim for interest fails to state a cause of action under either section, and that even if a stand-alone claim for accrued interest was actionable, the Complaint fails to allege that Plaintiff's benefits were withheld or delayed in violation of any specific provision of the LTD Plan or ERISA.

A. Whether Interest Payments for "Delayed Benefits" May be Recovered Under Section 502(a)(1)(B).

Section 502(a)(1)(B) of ERISA provides in pertinent part that a civil action may be brought by a participant or beneficiary of an employee welfare benefit plan:

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of

the plan.

29 U.S.C. §1132(a)(1)(B). Thus, Section 502(a)(1)(B) permits a claim for benefits due under the LTD Plan.

Plaintiff argues that interest payments should be viewed as necessary to receive "full and complete benefits" under the Plan, and maintains that the Court should recognize that employee welfare benefit plans impliedly contain interest payment provisions for "delayed benefits." Plaintiff, however, concedes that Defendant ABB's Plan documents are silent regarding the issue of interest payments.

No circuit has recognized a claim for interest under Section 502(a)(1)(B) of ERISA. The only circuit that has directly addressed the issue has ruled that if interest is not a benefit expressly provided for in the plan, it cannot be recovered in an action under Section 502(a)(1)(B) because "only benefits specified in the plan can be recovered in a suit under Section 502(a)(1)(B)." *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999), *cert denied*, 528 U.S. 1157 (2000).

Indeed, as Chief Judge Posner reasoned in *Clair*, the "argument that benefits include interest on benefits when benefits are paid late is inconsistent with the principle that benefits payable under an ERISA plan are limited to the benefits specified in the plan." *Id.* (citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 105 S.Ct. 3085, 3091 (1985)).

In the instant case, Plaintiff concedes that the LTD Plan does not specify interest benefits. Accordingly, the Complaint fails to state a cause of action under ERISA section 502(a)(1)(B).

B. Whether Interest Payments For "Delayed Benefits" Are Recoverable Under Section 502(a)(3)(B).

Although Plaintiff only asserts a one-count complaint for interest payments on "delayed benefits" and does not specify the statutory basis for his claim in Count I, Plaintiff appears to allege that his claim for interest payments is also cognizable under another ERISA provision. Section 502(a)(3), which provides in pertinent part that a civil action may be brought:

> by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

20 U.S.C. §1132(a)(3) (emphasis supplied). The Supreme Court has interpreted this section as a "catch-all" provision that acts as "a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

The parties dispute whether the interest Plaintiff seeks constitutes impermissible extracontractual money damages, or appropriate "equitable relief" within the meaning of Section 502(a)(3)(B). Defendants point to the Supreme Court's recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S.Ct. 708 (2002) for the proposition that "equitable relief" excludes all forms of monetary relief, including accrued interest. However, in *Knudson*, the Court did not specifically address the issue of accrued interest, but rather merely held that an insurance company's claim for reimbursement of benefits already paid to a beneficiary was a claim for money damages, and could not be sustained as a claim for "equitable relief" under ERISA. *See Knudson*, 122 S.Ct. at 713.

However, although the Eleventh Circuit has not addressed this issue of accrued interest on delayed benefits under ERISA, nearly all of the circuit courts to consider the issue have concluded that interest payments on delayed benefits may constitute "other equitable relief" within the meaning of Section 502(a)(3)(B). *See, e.g., Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229-230 (2nd Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001); *Clair*, 190 F.3d at 498-499; *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3rd Cir. 1998).

As the Second Circuit recently noted in *Dunnigan*, "the mere fact that money is sought does not necessarily classify the relief as damages, rather than extracontractual relief. Equity sometimes awards monetary relief." *Dunnigan*, 277 F.3d at 229

(citing *Clair*, 190 F.3d at 498). In the context of delayed benefits, accrued interest may constitute "appropriate equitable relief", as such relief may be necessary to prevent the unjust enrichment of the plan, *e.g.*, by virtue of the plan's retention of the time value of benefits that should have been otherwise paid at some earlier time. *See Id.*; *Jackson*, 245 F.3d at 750; *Clair*, 190 F.3d at 498-499; *Fotta*, 165 F.3d at 212. The rationale of the circuit courts, as set forth above, is consistent with the Supreme Court's recent decision in *Knudson*, which in any event did not address the issue of whether accrued interest may be available under ERISA as an equitable make-whole remedy to prevent unjust enrichment. Therefore, the Court concludes that Section 502(a)(3)(B) is an appropriate vehicle for Plaintiff to state a claim for accrued interest on delayed benefits.

The Court's inquiry does not end there, for the Court must still determine whether, in the context of a motion to dismiss, Plaintiff has alleged facts which make out a Section 502(a)(3)(B) claim for accrued interest as "delayed benefits." *See, e.g., Dunnigan*, 277 F.3d at 231. (Plaintiff may recover accrued interest by reason of unreasonable delay in payment of benefits); *Jackson*, 245 F.3d at 750 (accrued interest is available if benefits were wrongfully withheld or delayed in violation of the terms of the plan or ERISA); *Clair*, 190 F.3d at 498-99 (same).

In the instant case, the Complaint makes no allegations and fails to state any facts indicating that Plaintiff's benefits were wrongfully withheld and "delayed" in violation of any provision

of the Plan or ERISA. The Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures. Nor does the Complaint allege any facts which may indicate that the processing of his claim for disability benefits was otherwise unreasonable, or in violation of ERISA or the terms of the Plan. Without more, the Court must conclude that as pled, the Complaint fails to allege facts which make out a Section 502(a)(3)(B) claim for accrued interest with respect to "delayed benefits."

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss (D.E. 5) is **GRANTED**. The Complaint is **DISMISSED without prejudice**. It is further

ORDERED AND ADJUDGED that if deemed appropriate, Plaintiff must file an Amended Complaint within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of April, 2002.

/S/

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Garber
Mark J. Heise, Esq.
Lori A. Brown, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15029-DD

WILLIE R. FLINT, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

versus

ABB, INC., f.k.a. ABB Power,
et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed August 27, 2003)

BEFORE: BARKETT and KRAVITCH, Circuit Judges, and FULLAM*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/S/ PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

FILED
JAN 30 2004
OFFICE OF THE CLERK

No. 03-777

IN THE

Supreme Court of the United States

WILLIE R. FLINT,
On behalf of himself and all others similarly situated,

Petitioner,

v.

ABB, INC., f/k/a ABB POWER T&D CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Does § 502(a)(1)(B) or § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), authorize an ERISA plan participant to recover interest on long-term disability benefits paid after a successful administrative appeal where ERISA and the employee benefit plan do not provide for interest on reinstated benefits?

II.

Did the courts below err in dismissing the complaint with prejudice on several separate and independent grounds after allowing Petitioner an opportunity to amend his complaint once and without a further motion to amend by Petitioner?

STATEMENT PURSUANT TO RULE 29.6

The sole parent corporation of Respondent, ABB, Inc., is ABB, Ltd. of Zurich, Switzerland. No publicly held company owns 10% or more of ABB, Inc.'s stock. The remaining Respondents are all employee welfare or pension benefit plans organized pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* As such, the Plans are legal entities pursuant to ERISA. The Plans' sponsors, as defined by ERISA, are ABB, Inc. or subsidiaries of ABB, Inc. However, the Plans are not "owned" by any parent corporation, nor does any corporation own stock in any of the Plans.

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No. 03-777

IN THE

Supreme Court of the United States

WILLIE R. FLINT,
On behalf of himself and all others similarly situated,

Petitioner,

v.

ABB, INC., f/k/a/ ABB POWER T&D CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

For the following reasons, Respondents ABB, Inc., *et al.* ("ABB") respectfully suggest that the Petition for a Writ of Certiorari filed by Petitioner Willie R. Flint ("Flint") should be denied.

MISSTATEMENTS OF FACT OR LAW IN THE PETITION

Pursuant to Rule 15.2, ABB provides the following summary of misstatements of fact and law presented in the Petition for Certiorari.

1. ABB submits that the allegations in footnote 5 of the Petition, in which Flint contends "[t]he district court and court of appeals' opinions incorrectly state that Flint submitted additional *medical* information with his October appeal," (emphasis original), is a misstatement of the relevant facts. In paragraph 25 of the initial Complaint, Flint alleged that, following acceptance of his second appeal regarding the termination of his benefits, "Flint . . . furnished the *additional medical information* for his appeal" (emphasis added).

2. ABB submits that the allegations in Part IV. B of the Petitioner's "Statement" misstates the specific holding of the Court of Appeals with regard to Petitioner's claim pursuant to § 502(a)(3)(B). The Court expressly declined to decide whether § 502(a)(3)(B) could ever provide a basis for recovery of interest. It expressly affirmed based upon the District Court's conclusions that, assuming it could, Flint had failed to plead facts establishing a claim to relief. Pet. App. 10-12.

COUNTER-STATEMENT OF THE CASE

This case involves a claim for interest on a payment of disability benefits after a successful appeal under an employee long-term disability (LTD) benefit plan ("the Plan") established and maintained by ABB for its eligible employees. The Plan is therefore subject to the Employee Retirement

Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), as admitted in Flint's initial Complaint and Amended Complaint.[1] The dispute in this matter arose after Flint successfully appealed the termination of his benefits under the Plan, after which his benefits were reinstated and he received a retroactive, lump-sum payment of disability benefits. Pet. App. 3. Flint sought interest on the payment of benefits, which was denied by ABB. It is undisputed that the Plan did not provide for payment of interest in such circumstances. Pet. 7. It also is undisputed that the processing and determination of Flint's appeal was not in violation of the terms of the Plan, ERISA, or any Department of Labor regulations with regard to the timely processing of administrative appeals.[2] Pet. App. 3.

1. Background of Flint's Claim for Benefits.[3]

In March 1998, while Flint was an employee of ABB, he became disabled because of an automobile accident. Flint

1. Petitioner's request to certify the matter as a class action was denied as moot by the District Court based upon its determination on Respondents' Rule 12(b)(6) motion to dismiss. The class certification issue is not before this Court.

2. Flint does not make any allegation that the appeal process was untimely under ERISA or the terms of the Plan. *See* 29 C.F.R. ¶ 2560. 503-1(h)(1)(i)(60 days after request for review). In his Petition at 15, Flint admits the process was timely. This fact is also confirmed by affirmative allegations in the initial Complaint.

3. This matter is before the Court on review of the orders granting ABB's motions to dismiss the Complaint and the Amended Complaint as a matter of law pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the substantive facts presented herein are based upon the allegations of the Complaint and are taken as true only for the purpose of these motions.

applied for and was granted LTD benefits under the Plan. Three years later, on June 19, 2001, the third party administrator of the Plan, Kemper National Services ("Kemper"), notified Flint that he was no longer totally disabled within the definition of the Plan and that his benefits were being terminated effective July 1, 2001. Pet. App. 2-3.

On July 2, 2001, Flint, through his counsel, appealed the termination of his LTD benefits under the Plan, and provided additional information supporting Flint's continuing disability. ABB, through Kemper, denied Flint's appeal on August 31, 2001. In response to Flint's request, ABB and Kemper provided Flint with Plan documents pertaining to LTD benefits by letter dated October 17, 2001.

In October 2001, Flint, through his counsel, filed a second appeal of the termination of his LTD benefits, and provided additional information of his disability. Flint requested an extension of time to furnish an updated medical report to support reinstatement because he was unable to see his doctor before the end of the appeal period, which was granted. Twelve days after Flint's second appeal, in November 2001, Kemper granted Flint an extension of time to provide further medical information to support his claim. On a date not specified in either complaint, Flint provided additional medical information to support his appeal, and allegedly demanded reinstatement of his LTD benefits, plus payment of all back payments due with interest. Pet. 7; Pet. App. 3.

On December 20, 2001, thirty-eight days after Kemper acknowledged the second appeal and fifty-two days after Flint's second appeal, Kemper reinstated Flint's LTD benefits under the plan retroactive to July 1, 2001. Kemper issued a

check to Flint for the full amount of the benefits on December 28, 2001, going back to the date benefits were discontinued. Thereafter, Flint inquired why interest had not been included with his payment of benefits. Kemper informed Flint that the Plan does not require payment of interest, and therefore, interest is not included with the payment of reinstated benefits. Pet. 6-7; Pet. App. 3.

2. Flint's Initial Complaint Was Dismissed by the District Court.

In February 2002, Flint filed suit seeking interest on the payment of Plan benefits following his successful administrative appeal, which he characterized as "delayed benefits." Flint contended the failure to provide interest denied him of his "full and complete benefits," even though, as the initial Complaint expressly recognized, the Plan documents contained no provision for payment of interest. Flint asserted, however, that he was entitled to recover the claimed accrued interest pursuant to § 502(a)(1)(B) and § 502(a)(3)(B) of ERISA's civil enforcement provisions. Pet. 7; Pet. App. 4.

ABB, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moved to dismiss the Complaint for failure to state a claim upon which relief could be granted. The District Court granted the motion, by order filed April 10, 2002, as to the claim under § 502(a)(1)(B), ruling that, as a matter of law, there was no express or implied right to recover accrued interest for reinstated payments. The District Court reasoned this provision (§ 502(a)(1)(B)) was limited to claims for recovery of benefits as specifically provided in the relevant plan and, as the Complaint expressly averred the Plan did not provide for such interest, the Complaint failed to state a claim as a matter of law pursuant to § 502(a)(1)(B).

The District Court also granted ABB's motion with regard to Flint's claim under § 502(a)(3). The Court speculated that the "catch-all" provision therein concerning "appropriate equitable relief" *might* allow plaintiffs to recover accrued interest for reinstated benefits under circumstances where the benefits were unreasonably delayed or wrongfully withheld in violation of ERISA or the Plan. However, the District Court held the Complaint failed to plead any facts that would support such a claim and dismissed Flint's claim without prejudice and allowed Flint to submit an Amended Complaint.

Flint thereafter filed an Amended Complaint, which again asserted a claim for interest under the same ERISA civil enforcement provisions. Count I was premised upon § 502(a)(3) and claimed entitlement to interest on the retroactively-paid benefits on the basis of three alleged violations of ERISA or the Plan: (1) the failure to provide advance warning and an opportunity to submit additional medical information in support of continuing disability prior to terminating Flint's benefits; (2) inadequate notice of the specific reasons for termination of his benefits; and (3) providing Flint with incorrect Plan documents. The District Court concluded the first allegation was inadequate to support Flint's claim because there was no such requirement in the plan documents submitted, and relied upon, by Flint as attachments to the Amended Complaint. Pet. App. 20-21. The District Court found the second allegation was directly contravened by the written notice of the determination, which Flint also provided as an attachment to the Amended Complaint. *Id.*, 23. The District Court rejected the third allegation, finding there was no issue regarding the applicable plan documents, which Flint had attached and relied upon in the Amended Complaint. *Id.*, 24. In any event, the District Court questioned whether there was any logical relevance

between an alleged failure to provide plan documents after the denial of benefits where the alleged misconduct at issue was simply that the "initial denial itself should never have been made." *Id.*

Finally, the District Court held, as a matter of law, that whether or not the Plan's appeals process was timely completed was specifically relevant to whether a claim for interest could lie pursuant to the provisions for equitable relief in § 502(a)(3)(B).[4] Accordingly, as the Amended Complaint failed to plead facts demonstrating that benefits had been unreasonably delayed or wrongfully withheld, the District Court dismissed the Amended Complaint, with prejudice, for again failing to allege facts that, if proven, could entitle Flint to relief under § 502(a)(3)(B) or § 502(a)(1)(B).[5] Pet. App. 24-26.

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4. The District Court noted the Amended Complaint also sought payment of interest under several other theories of "equitable relief," such as a declaratory judgment that all payments by ABB for delayed benefits must include interest, an injunction requiring payment of interest on delayed benefits, the imposition of a constructive trust upon all Plan assets equal to interest on delayed benefits, and equitable restitution in the amount of interest on the delayed benefits. The Court questioned whether such payment of interest under such theories comported with the definition of the term "equitable relief" in § 502(a)(3)(B) pursuant to the holdings of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In any event, the Court declined to rule on the issue, in light of its ruling that the Amended Complaint failed to allege facts establishing any violation of the terms of the Plan or of ERISA. Pet. App. 26-27.

5. Count II of the Amended Complaint essentially re-pled the allegations of the initial Complaint with respect to the requested relief pursuant to § 502(a)(1)(B), which Flint acknowledged had been already foreclosed by the District Court's prior order and was presented solely for preservation of the issue on appeal. Pet. App. 27.

3. The Eleventh Circuit Court of Appeals Affirmed the District Court's Dismissal.

The Court of Appeals rejected Flint's assertions of error. First, the Court categorically refused to adopt Flint's argument that accrued interest in this situation amounted to an implied term of the Plan and thus qualified as "benefits due . . . under the terms of his plan" within the meaning of § 502(a)(1)(B). The Court of Appeals relied specifically upon the Supreme Court's repeated cautions against the drawing of inferences regarding implied causes of action in the ERISA context not specifically provided by Congress within ERISA's "carefully crafted and detailed enforcement scheme." Furthermore, the Court below noted that none of the Circuit Courts of Appeals have recognized a claim for interest pursuant to § 502(a)(1)(B) of ERISA under circumstances similar to the instant case. Pet. App. 6-7.

Regarding Flint's claim that the interest he sought qualified as "other equitable relief" pursuant to § 502(a)(3), the Court of Appeals declined to determine whether or not such a claim could be maintained as a matter of law. The Court held that, assuming such a claim was viable, the District Court correctly determined that the Amended Complaint failed to establish the necessary predicate of a breach of the Plan, of ERISA or of the Department of Labor's regulations. Pet. App. 10. The Court rejected Flint's theory that ABB breached its fiduciary duty by discontinuing benefits without first providing Flint with an opportunity to prove continued disability, concluding there was no such requirement in the terms of the Plan relied upon by the Amended Complaint. In this respect, the Court noted that "ERISA employers owe a fiduciary duty to all of their covered employees [and that] ABB had a duty to protect and preserve benefit funds

according to the provisions of the Plans and the ERISA statute." *Id.*, 11. Finally, the Court noted that no facts were pled suggesting that ABB unduly delayed the appeals process or wrongfully failed to reinstate Flint's benefits as a result of his appeal. In fact, the Court concluded that "Flint's own allegations make clear that the appeals process functioned according to Plan provisions and ERISA regulations—and that this process led to the retroactive reinstatement of benefits within six months of the initial adverse decision." *Id.*, 11-12. For these reasons, the Court of Appeals concluded Flint had not stated a claim under § 502(a)(3)(B).

REASONS FOR DENYING THE PETITION

1. There is No Conflict Among the Circuit Courts of Appeals Regarding Whether a Refusal to Pay Interest on Benefits Paid After a Successful Appeal Will Support a Claim Under §§ 503(a)(1)(B) or 503(a)(3)(B) Without Any Violation of the Plan, ERISA or Related Regulations.

Flint suggests "the answers are conflicting" among the Circuit Courts of Appeals as to whether interest is an available remedy where "benefits are paid retroactively . . . as a result of a successful administrative appeal." Pet. 13-14. However, the cases Flint string-cites for this assertion (without discussion) do not support his Petition.

First, Flint cites *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 319 F.3d 612 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 468 (2003). *Fotta*, however, did not involve a claim under 502(a)(1)(B) at all. Further, it expressly holds that, in order to prevail on a

claim based upon § 502(a)(3)(B), "an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself." *Id.*, 319 F.3d at 616. This case clearly is consistent with the Eleventh Circuit's determination in the instant case. The same is true of *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748 (8th Cir. 2001), which dismissed a complaint seeking interest based on the absence of any factual allegation of a breach of a plan term or ERISA.

Flint also cites *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002). In *Dunnigan*, however, the complaint expressly alleged that the denial of the participant's benefit application and appeal occurred after the expiration of "the time periods specified by the Secretary of Labor's regulations." *Id.*, at 226. Indeed, the delay in the administrative appeal process in *Dunnigan* exceeded five years. *Id.*, at 230. Therefore, *Dunnigan* provides no conflict with the Court of Appeals' decision below that a claim under § 502(a)(3)(B) must be supported by an alleged violation of the Plan or of the provisions of ERISA or its regulations. Similarly, *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999) does not support Flint because the Eighth Circuit: (1) expressly rejected the plaintiff's claim for interest pursuant to § 502(a)(1)(B), and 2) held that interest was not recoverable as "appropriate equitable relief" under § 502(a)(3)(B). *Id.*, 184 F.3d at 945.

The final case cited by Flint in support of his contention that there is conflict between or among the circuits, *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495 (7th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000), actually carries the day for ABB. *Clair* not only rejected an interest claim under

§ 502(a)(1)(B) on the same grounds upon which the courts below ruled in the instant action, but also held the same claim pursuant to § 502(a)(3)(B) "borders on the frivolous." *Id.*, 190 F.3d at 497, 499.

2. There is no Compelling Reason for Supreme Court Review.

a. Flint's claim for interest on benefits as an "implied term" of the Plan is unsupported by any decision of a Court of Appeals and is in direct conflict with established precedent of the Supreme Court.

Flint identifies no case, whether issued by a District Court or a Court of Appeals, holding that a cause of action exists under any of ERISA's precisely drawn civil remedy provisions to recover interest as an "implied term" of an ERISA plan. Flint attempts to coble together authority for his proposition via a strained extrapolation of non-ERISA decisions regarding the common law of contracts. In so doing, however, Flint finds himself arguing against well-established precedent of this Court.

The High Court has repeatedly and strongly cautioned against the drawing of inferences regarding the existence of remedies in ERISA that were not explicitly provided for by Congress. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), *overruled, in part, on other grounds, Kentucky Association of Health Plans, Inc. v. Miller,* 123 S. Ct. 1471 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Russell*, the Court "emphasized [its] unwillingness to infer

causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (quoting *Russell*, 473 U.S. at 146-7). *Russell* addressed a claim under § 502(a)(1)(B) and held that the statutory sections say "nothing about the possible consequences of delay in the plan administrator's processing of a disputed claim[;] [t]hus, there is really nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief." *Russell*, 473 U.S. at 144. Flint's claim for interest on benefits approved on appeal seeks relief based on the "consequences of delay" foreclosed by *Russell*.

Flint argues that "ERISA Plans are contractual" and cites cases allowing interest on contract claims. Flint further contends that Congress did not "intend to overrule, sub silentio, over 150 years of contract law making interest an implied term of all contracts." Pet. 12-13. Flint apparently forgets that ERISA is inherently equitable, not legal in nature. In adopting the discretionary review standard from trust law and courts of equity, this Court noted in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989), as follows:

> Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by contract law.

ERISA does not adopt contract law or legal relief flowing from contracts, but instead follows trust law and awards equitable relief as specified in the statues. *Id.*, at 110. *Russell*, 473 U.S. at 146.

Flint suggests that the Court of Appeals' decision on this issue somehow conflicts with the basic purpose of ERISA. Pet. 12-13. As this Court noted in *Mertens*, "[v]ague notions of [ERISA's] basic purpose are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens*, 508 U.S. at 261.

b. Flint's Claim Under § 502(a)(3) for Interest Following a Successful Administrative Appeal is not Cognizable under ERISA.

As discussed above, Flint lacks authority for recognition of a cause of action under § 502(a)(3) under the facts presented. Indeed, Flint acknowledges the impact of *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), as "cast[ing] doubt on those cases relying on § 502(a)(3)(B)." Pet. 14. The courts below were correct in holding interest under § 502(a)(3) is not "equitable relief" and that no such claim could exist absent a breach of the Plan or ERISA.

3. The District Court properly exercised its discretion in disregarding documents submitted by Flint which were not attached to or referenced in the Amended Complaint and were not verified.[6]

Upon the dismissal of Flint's initial Complaint, the District Court allowed Flint ample time to file an Amended Complaint, which he did. In his opposition brief to ABB's Motion to Dismiss the Amended Complaint, Flint attached information relating to Flint's disability and pages from

6. The Court of Appeals did not specifically address this issue in the decision on appeal.

benefit plans without any verification or affidavit identifying them. No attempt was made by Flint to amend the complaint to add them or allegations relating to them. Moreover, Flint fails to identify anything in the unverified documents which supports his claim for interest. Instead, they relate to the underlying claim for disability benefits, which was paid by ABB after Flint's successful appeal.

In any event, Flint does not explain to this Court in any way how the proffered documents give rise to a claim for interest under ERISA.

CONCLUSION

For the foregoing reasons, the undersigned submits the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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